APAAC Sex Crimes Seminar 2014: Cruel & Unusual Punishment

This outline has several goals: (1) to provide an overview of Eighth Amendment jurisprudence, including the gross-disproportionality principle; (2) to demonstrate that the Arizona Supreme Court has promulgated a two-step inquiry when applying the gross-disproportionality principle to mandatory sentences in non-capital cases; (3) to help prosecutors recognize which cases risk running afoul of the Arizona Supreme Court's current standard and how to develop the record to defeat impending Eighth Amendment challenges; and (4) to arm prosecutors with case law addressing the arguments defendants most commonly raise on appeal.

I. General overview.

1. Constitutional provisions. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Arizona Constitution's corresponding provision similarly states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Ariz. Const. art. II, § 15. Arizona courts have "accorded identical scope" to the Eighth Amendment and Arizona Constitution Article II, Section 15's prohibition against cruel and unusual punishments. *See State v. Zimmer*, 178 Ariz. 407, 410, 874 P.2d 964, 967 (App.1993) (collecting cases).

2. Subject to several important qualifications set forth below, the Supreme Court has construed the "cruel and unusual punishment" clause of the Eighth Amendment to prohibit "not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem v. Helm*, 463 U.S. 277, 284 (1983). *See also Coker v. Georgia*, 433 U.S. 584, 591–92 (1977) (collecting cases).

3. In the *capital*-punishment context, the Supreme Court's Eighth Amendment jurisprudence prohibits the imposition of the death penalty for crimes that do not involve the intentional, reckless, or extremely indifferent taking of human life, as execution does not constitute punishment that is strictly proportionate to the harm caused by such crimes. *See Kennedy v. Louisiana*, 554 U.S. 407, 441–42 (2008) ("The incongruity between the crime of child rape and the harshness of the death penalty poses risks of over-punishment and counsels against a constitutional ruling that the death penalty can be expanded to include this offense."); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (finding the death penalty disproportionate to the crime of robbery, which does not entail the taking of human life, and holding that a defendant convicted of felony-murder should not receive the death penalty where he neither killed, attempted to kill, or intended to kill, the victim during the robbery); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) ("Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person.").

4. The Supreme Court's capital Eighth Amendment jurisprudence also requires an individualized sentencing process in death-penalty cases to ensure that the particular defendant at issue truly deserves capital punishment. *See Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) ("[W]e have explained that capital punishment must 'be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'") (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)); *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990) ("We have reiterated the general principle that aggravating circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not.") (citing *Spaziano v. Florida*, 468 U.S. 447, 460 (1984), and *Zant v. Stephens*, 462 U.S. 862, 877 (1983)); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this penalty to be ... wantonly and ... freakishly imposed."); *Lockett v. Ohio*, 438 U.S. 586, 605 (1977) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.").

5. Accordingly, the Supreme Court has held that: (1) "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *Lockett v. Ohio*, 438 U.S. 586, 604 (1977) (footnote omitted); and (2) certain personal characteristics, such as youthfulness and mental retardation, effectively render several sub-classes of murderers categorically ineligible for the death penalty, *see Roper v. Simmons*, 543 U.S. 551, 578 (2005) (juvenile status); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (mental retardation).

6. Significantly, the Supreme Court has confined these principles to its *capital* Eighth Amendment jurisprudence. One resulting consequence is that defendants convicted of *non*-capital offenses are *not* entitled to "individualized sentencing" and therefore may constitutionally suffer the imposition of statutorily-mandated sentences. *See Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) ("Our cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties."); *id.* at 1006 ("The Court demonstrates that our Eighth Amendment capital decisions reject any requirement of individualized sentencing in non-capital cases.") (Kennedy, J., concurring); *Chapman v. United States*, 500 U.S. 453, 467 (1991) ("Congress has the power to define criminal punishments [in non-capital cases] without giving the courts any sentencing discretion."); *Pulley v. Harris*, 465 U.S. 37, 43-45 (1984) (concluding that non-traditional proportionality review, which sought to require courts to assess "whether [a] penalty is ... unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime[,]" is not constitutionally mandated); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (observing that "the prevailing practice of individualizing

sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative"); *Williams v. Illinois*, 399 U.S. 235, 243 (1970) ("The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences.").

7. With the exception of recent decisions invalidating life-without-parole ("LWOP") sentences imposed against juveniles, *see Miller v. Alabama*, 132 S.Ct. 2455 (2012) (mandatory LWOP sentences for juveniles convicted of murder violate the Eighth Amendment); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (prohibiting LWOP sentences for juveniles convicted of non-homicide offenses), the Supreme Court does not afford *non*-capital defendants an Eighth-Amendment right to sentences that are strictly proportionate to their personal moral culpability or commensurate to the sentences imposed upon other persons convicted of the same offense. *See United States v. Gomez*, 472 F.3d 671, 674 (9th Cir. 2006) (relying upon *Harmelin* to reject defendant's argument that federal sentencing statute "unconstitutionally precludes consideration of the fact that his 2004 conviction for refusing to give information to a police officer was a minor offense"); *United States v. Layne*, 324 F.3d 464, 474 (6th Cir. 2003) (relying upon *Harmelin* to reject defendant's argument that her sentence was not proportional to sentences that other defendants received for the same offenses); *Alvarado v. Hill*, 252 F.3d 1066, 1069–70 (9th Cir. 2001) (rejecting argument that mandatory juvenile sentencing scheme violated Eighth Amendment because "it did not afford meaningful individualized consideration of mitigating evidence, such as the background, character, or youth of a defendant, or the circumstances of the crime"); *United States v. LaFleur*, 971 F.2d 200, 211–12 (9th Cir. 1991) (recognizing that there is no constitutionally mandated individualized sentencing doctrine outside the capital context).

8. The distinction between capital and non-capital sentences is important also because the Supreme Court has declined to extend the strict-proportionality principle that governs death-penalty cases to non-capital sentences, which are governed instead by a far more deferential constitutional standard, to wit: "A gross disproportionality principle is applicable to sentences for terms of years." *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003). *See also Ewing v. California*, 538 U.S. 11, 30–31 (2003) ("We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not *grossly disproportionate* and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments.") (emphasis added); *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) ("The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are '*grossly disproportionate*' to the crime.") (Kennedy, J., concurring) (emphasis added) (citing *Solem v. Helm*, 463 U.S. 277, 288 (1983); *Rummel v. Estelle*, 445 U.S. 263, 271 (1980); and *Weems v. United States*, 217 U.S. 349, 550 (1910)).

9. During the past century, the Supreme Court has found only two non-capital sentences unconstitutional under this extremely deferential "narrow proportionality principle," but it has upheld terms of imprisonment in at least five

other decisions:

> In *Weems v. United States*, 217 U.S. 349, 367 [ ] (1910), the Court invalidated under the Eighth Amendment a sentence of fifteen years in chains and at hard labor, plus permanent surveillance and civil disabilities, for the crime of falsifying a public document. Seventy-three years later, in *Solem v. Helm*, 463 U.S. 277 [ ] (1983), the Court invalidated under the Eighth Amendment a sentence of life imprisonment without the possibility of parole imposed under South Dakota law against a nonviolent recidivist whose final crime was writing a "no account" check with the intent to defraud.
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> In contrast to these two cases, the Supreme Court has rejected Eighth Amendment challenges to the following sentences:
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> • A life sentence, with the possibility of parole, under a Texas recidivist statute for successive convictions of (1) fraudulent use of a credit card to obtain $80 worth of goods or services, (2) passing a forged check in the amount of $28.36, and (3) obtaining $120.75 by false pretenses. *Rummel v. Estelle*, 445 U.S. 263, 285 [ ] (1980).
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> • A forty-year sentence for possession and distribution of 9 ounces of marijuana. *Hutto v. Davis*, 454 U.S. 370, 375 [ ] (1982).
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> • A life sentence, without the possibility of parole, for possession of more than 650 grams of cocaine. *Harmelin*, 501 U.S. at 1005 [ ].
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> • A twenty-five year to life sentence imposed under a California recidivist statute for the offense of felony grand theft (*i.e.*, stealing three golf clubs worth approximately $1,200). *Ewing*, 538 U.S. at 30–31 [ ].
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> • Two consecutive twenty-five-year to life sentences under a California recidivist statute for two counts of petty theft. *Lockyer v. Andrade*, 538 U.S. 63, 77 [ ] (2003).
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> Considered together, these cases clearly support the Supreme Court's recent statement in *Andrade* that "[t]he gross disproportion-ality principle reserves a constitutional violation for only the extra-ordinary case." 538 U.S. at 76 [ ].

United States v. Angelos, 433 U.S. 738, 750–51 (10th Cir. 2006).

10. Until 1991, the Supreme Court's standard for determining whether a non-capital sentence violated the Eighth Amendment required the judiciary to review *all three* of the following components: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same

jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem v. Helm*, 463 U.S. 277, 292 (1983). That year, the Supreme Court modified *Solem's* standard in two significant ways:

> **(A) The first prong is satisfied *only* if the defendant's sentence is "*grossly* disproportionate" to his crime—strict proportionality is not required.** *See Graham v. Florida*, 130 S.Ct. 2011, 2021 (2010) ("[Justice Kennedy's] controlling opinion [in *Harmelin v. Michigan*, 501 U.S. 957 (1991)] concluded that the Eighth Amendment contains a 'narrow proportionality principle,' that 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are 'grossly disproportionate' to the crime.'") (quoting *Harmelin*, 501 U.S. at 997, 1000-01 (Kennedy, J., concurring)). *Accord Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) ("The gross disproportionality principle reserves a constitutional violation for only the extraordinary case."); *Ewing v. California*, 538 U.S. 11, 23 (2003) ("The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime.") (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).
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> **(B) The defendant's inability to make the threshold showing that his sentence is grossly disproportionate to his sentence effectively terminates the reviewing court's inquiry, because the sole function of intra- and inter-jurisdictional comparative analyses is to validate the inference of gross-disproportionality.** *See Ewing v. California*, 538 U.S. 11, 23 (2003) ("Justice Kennedy's concurrence [in *Harmelin*] also stated that *Solem* 'did not mandate' comparative analysis 'within and between jurisdictions.'"); *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (stating that "intra-jurisdictional and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," and "[t]he proper role for comparative analysis of sentences then is to validate an initial judgment that a sentence is grossly disproportionate to a crime.") (Kennedy, J., concurring); *United States v. Nigg*, 667 F.3d 929, 938 (7th Cir. 2012) ("The first factor is a threshold factor; if an inference of gross disproportionality is not established, the analysis ends there."); *United States v. Moore*, 643 F.3d 451, 456 (6th Cir. 2011) ("Because a 'threshold comparison' of the gravity of Moore's offense and the severity of his sentence does not reveal an inference of gross disproportionality, we need not engage in the second step of the proportionality analysis by comparing his sentence with those of offenders in this and other jurisdictions."); United States v. Farley, 607 F.3d 1294, 1342 (11th Cir. 2010) ("Without an initial judgment that a sentence is grossly disproportionate to a crime, comparative analysis of sentences has no role to play."); *United States v. Polk*, 546 F.3d 74, 76 (1st Cir. 2008) (a reviewing court "need not mull the latter two criteria unless the sentence imposed crosses the threshold erected by the first; that is, unless the sentence, on its face, is grossly disproportionate to the crime"); *United States v. Walker*, 473 F.3d 71, 82 (3rd Cir. 2007) ("[T]he first proportionality factor acts as

a gateway or threshold. If the defendant fails to show a gross imbalance between the crime and the sentence, our analysis is at an end."); *State v. Berger*, 212 Ariz. 473, 476, ¶ 12, 134 P.3d 378, 381 (2006) ("If this comparison leads to an inference of gross disproportionality, the court then tests that inference by considering the sentences the state imposes on other crimes and the sentences other states impose for the same crime."); *State v. Lujan*, 184 Ariz. 556, 562, 911 P.2d 562, 568 (App.1995) ("Because our analysis leads us to conclude that this is not "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," we must decline the dissent's invitation to extend our analysis to an intra- and inter-jurisdictional proportionality review.").

The practical effect of the sea-change occasioned by Justice Kennedy's controlling opinion is that defendants may not establish Eighth Amendment violations by showing that Arizona imposes the most severe sentence in the nation for his crime of conviction. *See Harmelin v. Michigan*, 501 U.S. 957, 996-1009 (1991) (eschewing extended proportionality analysis for life without parole sentence for possession of 650 grams of cocaine, notwithstanding the fact that Michigan's penalty was harshest in entire country); *State v. Berger*, 212 Ariz. 473, 480, ¶ 29, 134 P.3d 378, 385 (2006) (upholding mandatory minimum 10-year sentences for possession of child pornography without conducting inter- and intra-jurisdictional analysis, despite the fact Arizona's penalty for this crime ranks as the Nation's stiffest sentence).

11. Justice Kennedy distilled the gross-disproportionality principle from four other important considerations:

> All of these principles—the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors—inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.

Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (collecting cases). **The critical role of the gross-disproportionality principle in the Supreme Court's analysis merits an overview of its component doctrines.**

> **A. "The first of these principles is that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'"** *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980)). *Accord Ewing v. California*, 538 U.S. 11, 28 (2003) ("We do not sit as a 'super-legislature' to second-guess these policy choices. It is enough that the State of California has a reasonable basis for

believing that dramatically enhanced sentences for habitual felons 'advances the goals of its criminal justice system in any substantial way.'") (quoting *Solem v. Helm*, 463 U.S. 277, 297 n.22 (1983)) (internal alterations deleted); *id.* at 24 ("Though three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding.") (collecting cases); *Harmelin*, 501 U.S. at 998 (Kennedy J., concurring) ("The efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system. And the responsibility for making these fundamental choices and implementing them lies with the legislature."); *Rummel v. Estelle*, 445 U.S. 263, 283-84 (1980) ("Penologists themselves have been unable to agree whether sentences should be light or heavy, discretionary or determinate. This uncertainty reinforces our conviction that any 'nationwide trend' toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts."); *United States v. Meiners*, 485 F.3d 1211, 1213 (9th Cir. 2007) ("The Supreme Court has repeatedly emphasized that 'federal courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare.'") (quoting *Ewing*, 538 U.S. at 22) (quoting *Davis*, 454 U.S. at 374); *United States v. Barajas-Avalos*, 377 F.3d 1040, 1060 (9th Cir. 2004) ("In both cases [*Harmelin* and *Davis*], the Supreme Court determined that federal courts should be reluctant to review legislatively mandated terms of imprisonment because 'the fixing of prison terms for specific crimes ... is properly within the province of legislatures, not courts.'") (quoting *Harmelin*, 501 U.S. at 998) (quoting *Rummel*, 445 U.S. at 275–76); *United States v. Layne*, 324 F.3d 464, 473-74 (6th Cir. 2003) ("Courts assessing whether the Eighth Amendment's limited guarantee of proportionality has been satisfied must 'grant substantial deference to the ... legislatures ... in determining the types and limits of punishments for crimes.'") (quoting *Harmelin*, 501 U.S. at 999); *United States v. Saccoccia*, 58 F.3d 754, 789 (1st Cir. 1995) ("We also know that Congress—not the judiciary—is vested with the authority to define, and attempt to solve, the societal problems created by drug trafficking across national and state borders.").

B. "The second principle is that the Eighth Amendment does not mandate adoption of any one penological theory." *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (identifying retribution, deterrence, incapacitation, and rehabilitation among penological goals reflected in legislation and observing the varying degrees of ascendancy of the competing theories of discretionary and mandatory sentencing schemes in our national history) (Kennedy J., concurring). *See also Ewing v. California*, 538 U.S. 11, 25 (2003) ("Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution does not mandate adoption of any one penological theory. …

A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. … Some or all of these justifications may play a role in a State's sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.") (internal citations and quotation marks omitted); *Gore v. United States*, 357 U.S. 386, 393 (1958) ("In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility …, these are peculiarly questions of legislative policy.").

C. The third principle of gross disproportionality is that "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure." *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring). Federalism complicates any inter-jurisdictional comparison of sentencing statutes for two reasons: (1) "State sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise," *id.* at 999-1000 (citing *Rummel v. Estelle*, 445 U.S. 263, 281 (1980), and *Solem v. Helm*, 463 U.S. 277, 294-95 (1983)); and (2) "even assuming identical philosophies, differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes," *id*. at 1000.

These realities led Justice Kennedy to conclude that "the circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate." *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring) (citing *Rummel v. Estelle*, 445 U.S. 263, 281 (1980)). *Accord id.* at 990 ("Diversity not only in policy, but in the means of implementing policy, is the very raison d'être of our federal system. … The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.") (Scalia, J., lead opinion); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984) ("The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws."); *Rummel v. Estelle*, 445 U.S. 263, 281 (1980) ("Even were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other States."); *id.* at 282 ("Absent a constitutionally

imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.").

D. "The fourth principle at work in [the Supreme Court's] cases is that proportionality review by federal courts should be informed by 'objective factors to the maximum possible extent.'" *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)). Whereas the Supreme Court could objectively differentiate "types of punishment," such as execution, terms of imprisonment, and *cadena temporal*, its prior decisions demonstrated the absence of "clear objective standards to distinguish between sentences for different terms of years." *Id.* at 1000–01 ("By contrast, our decisions recognize that we lack clear objective standards to distinguish between sentences for different terms of years.") (Kennedy, J., concurring). *See also Solem v. Helm*, 463 U.S. 277, 294 (1983) ("It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not."); *Hutto v. Davis*, 454 U.S. 370, 373 (1982) (explaining that the Court drew a distinction drawn between punishments varying from others in type and those that differ only in duration of incarceration on two grounds: concern that its Eighth Amendment judgments would appear to be the subjective views of the individual justices, and fact that "the excessiveness of one prison term as compared to another is invariably a subjective determination"); *Rummel*, 445 U.S. at 275 ("Since *Coker* involved the imposition of capital punishment for the rape of an adult female, this Court could draw a 'bright line' between the punishment of death and the various other permutations and commutations of punishments short of that ultimate sanction. For the reasons stated by Mr. Justice Stewart in *Furman* [*v. Georgia*, 408 U.S. 238 (1972)], this line was considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years.").

Consequently, "the relative lack of objective standards concerning terms of imprisonment has meant that 'outside the context of capital punishment, successful challenges to the proportionality of particular sentences are exceedingly rare.'" *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (original alterations deleted) (quoting *Solem*, 463 U.S. at 289–90) (quoting *Rummel*, 445 U.S. at 272). *Accord Davis*, 454 U.S. at 374 ("In short, *Rummel* stands for the proposition that federal courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare.").

12. Defendants who receive lengthy consecutive sentences frequently attempt to skew the court's Eighth Amendment analysis by framing the issue in terms of the aggregate total of their sentences and complaining that the cumulative total of these sentences exceeds his life expectancy. This argument cannot withstand the following principles:

A. "Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." *State v. Berger*, 212 Ariz. 473, 479, ¶ 28, 134 P.3d 372, 378 (2006) (quoting *United States v. Aiello*, 864 F.2d 257, 265 (2nd Cir. 1988)). *Accord United States v. Ming Hong*, 242 F.3d 528, 532 (4th Cir. 2001); *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001); *Hawkins v. Hargett*, 200 F.3d 1279, 1285 n.5 (10th Cir. 1999); *State v. Kasic*, 228 Ariz. 228, 233, ¶ 24, 265 P.3d 410, 415 (App.2011); *People v. Martinez*, 179 P.3d 23, 26 (Colo.App.2007); *Rooney v. State*, 690 S.E.2d 804, 810 (Ga.2010); *People v. Elliott*, 112 N.E. 300, 304 (Ill. 1916); *State v. Ward*, 21 A.3d 1033, 1039, ¶ 22 (Me.2011); *Malee v. State*, 809 A.2d 1, 8-9 (Md.App.2002); *People v. Kennebrew*, 560 N.W.2d 354, 358 (Mich. App. 1996); *State v. Houk*, 747 P.2d 1376, 1378–79 (Nev. 1987); *State v. Hairston*, 888 N.E.2d 1073, 1077-78 (Ohio 2008); *State v. Iannarelli*, 759 N.W.2d 122, 125 & n.3 (S.D.2008); *State v. Venman*, 564 A.2d 574, 582 (Vt. 1989); *Wahleithner v. Thompson*, 143 P.3d 321, 323, ¶ 12 (Wash. App. 2006).

B. Furthermore, "if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in the aggregate." *State v. Berger*, 212 Ariz. 473, 479, ¶ 28, 134 P.3d 372, 378 (2006) (citing *State v. Jonas*, 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990)). *Accord United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2004) (upholding statutorily-mandated consecutive sentences totaling over 71 years where none of the individual sentences was "intrinsically 'grossly disproportionate' to the crime"); *Walton v. Scott*, 445 S.W.2d 97, 99 (Ark.1969) ("We can find in the constitution no yardstick enabling us to announce with confidence that the penalty is valid when one package is involved, that it is valid when 120 packages are involved, but that it is not valid when 894 packages are involved."); *State v. Dillard*, 320 So.2d 116, 122 (La.1975) ("Consecutive sentences of imprisonment for conviction of separate offenses do not render a punishment cruel and unusual, where the penalty upon conviction of each offense is itself valid."); *People v. Gay*, 960 N.E.2d 1272, 1279, ¶ 25 (Ill.App.2011) ("The eighth amendment allows the State to punish a criminal for each crime he commits, regardless of the number of convictions or the duration of sentences he has already accrued."); *State v. Hairston*, 888 N.E.2d 1073, 1078, ¶ 20 (Ohio 2008) ("Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from

consecutive imposition of those sentences does not constitute cruel and unusual punishment.")

C. "This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences." *State v. Berger*, 212 Ariz. 473, 479, ¶ 28, 134 P.3d 372, 378 (2006) (upholding the imposition of 20 consecutive 10-year prison sentences for 20 counts of possession of child pornography). *Accord Lockyer v. Andrade*, 538 U.S. 63, *77* (2003) (upholding two statutorily-mandated consecutive prison terms of 25 years to life for two counts of petty theft under California's recidivist statute); *O'Neil v. Vermont*, 144 U.S. 323, 331 (1892) (307 consecutive prison terms exceeding 54 years for 307 counts of selling illegal liquor); *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2004) ("The Supreme Court has never held that a sentence to a specific term of years, even if it might turn out to be more than the reasonable life expectancy of the defendant, constitutes cruel and unusual punishment."); *United States v. Yousef*, 327 F.3d 56, 163 (2d Cir. 2003) ("Lengthy prison sentences, even those that exceed any conceivable life expectancy of a convicted defendant, do not violate the Eighth Amendment's prohibition against cruel and unusual punishment when based on a proper application of the Sentencing Guidelines or statutorily mandated prison terms.") (collecting cases); *State v. Long*, 207 Ariz. 140, 145-47, ¶¶ 26-34, 83 P.3d 619, 623-25 ¶¶ 26–34 (App.2004) (upholding 20-year sentence for sexual exploitation of a minor imposed consecutive to 24-year sentence for sexual conduct with a minor under 15 years old); *State v. Jones*, 188 Ariz. 534, 545-46, 937 P.2d 1182, 1194-95 (App.1996) (six consecutive 25-year sentences for sexual assault); *State v. Hamilton*, 177 Ariz. 403, 407-08, 868 P.2d 986, 990-91 (App.1993) (aggregate of 135 years flat time for three acts of molestation and three acts of sexual conduct by live-in boyfriend against his girlfriend's 14-year-old daughter).

D. "A defendant has no constitutional right to concurrent sentences for two separate crimes involving separate acts." *State v. Jonas*, 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990). *See also Oregon v. Ice*, 555 U.S. 160, 168-69 (2009) **(**"The historical record further indicates that a judge's imposition of consecutive, rather than concurrent, sentences was the prevailing practice."); *United States v. Candia*, 454 F.3d 468, 474 (5th Cir. 2006) ("The Constitution does not afford a defendant the right to have his state and federal sentences run concurrently."); *United States v. White*, 240 F.3d 127, 135 (2nd Cir. 2001) ("Second, and perhaps more important, we are aware of no constitutionally cognizable right to concurrent, rather than consecutive, sentences."); *Rosemond v. State*, 756 P.2d 1180, 1181 (Nev.1988) (same). Indeed, such a "right" would absurdly allow defendants to evade the full extent of punishment legislatively prescribed for their crimes and treat them as if they had committed but one offense. *See United States v. Schell*, 692 F.2d 672, 675

(10th Cir. 1982) ("The Eighth Amendment does not prohibit a state from punishing defendants for the crimes they commit; the amendment prohibits a sentence only if it is grossly disproportionate to the severity of the crime."); *State v. Sanders*, 118 Ariz. 97, 100, 574 P.2d 1316, 1319 (App.1977) ("The record here discloses a vicious attack upon a fellow inmate, resulting in a serious injury. Under the circumstances, a concurrent sentence would be, practically speaking, no punishment at all."); *State v. McNally*, 211 A.2d 162, 164 (Conn.1965) ("It would be preposterous to hold that a person who commits a crime has a constitutional right to escape punishment for it."); *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999) ("There is nothing cruel and unusual about punishing a person committing *two* crimes more severely than a person committing only one crime, which is the effect of consecutive sentencing.") (emphasis in original); *Malee v. State*, 809 A.2d 1, 9 (Md.App.2002) (upholding imposition of multiple consecutive sentences as "preventing duly convicted offenders from escaping punishment of their criminal acts"); *State v. Murray*, 563 A.2d 488, 500 (N.J.App.1990) (rejecting challenge to imposition of consecutive sentences because "there can be no free crimes in a system for which the punishment shall fit the crime.").

13. The *mandatory* nature of lengthy consecutive prison terms likewise causes no constitutional insult. "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Harmelin v. Michigan*, 501 U.S. 957, 994-95 (1991) (Scalia, J., lead opinion). *Accord Lockyer v. Andrade*, 538 U.S. 63, 68, 77 (2003) (upholding two statutorily-mandated consecutive prison terms of 25 years to life imprisonment); *United States v. Khan*, 461 F.3d 477, 495 (4th Cir. 2006) ("Even a mandatory *life* sentence passes constitutional muster.") (emphasis in original); *United States v. Saccoccia*, 58 F.3d 754, 788 (1st Cir. 1995) ("Throughout, the Justices have made it quite clear that strict judicial scrutiny of statutorily mandated penalties in non-capital cases is not to be countenanced."); *State v. Taylor*, 160 Ariz. 415, 422, 773 P.2d 974, 981 (1989) ("Mandatory sentences have repeatedly withstood constitutional attack.") (collecting cases).

II. Arizona's bifurcated gross-disporportionality standard.

1. Several years after *Harmelin*, the Arizona Supreme Court abandoned its prior approach of examining the particular offender and the unique circumstances of the crime, in favor of a gross-disproportionality standard under which "the initial threshold disproportionality analysis is to be measured by the nature of the offense generally and not specifically." *State v. DePiano*, 187 Ariz. 27, 30, 926 P.2d 494, 497 (1996).

2. Seven years later, however, the Arizona Supreme Court repudiated *DePiano* and instead held that it is both useful and appropriate for the reviewing court to analyze "the specific facts and circumstances of the offenses when

determining if a sentence is grossly disproportionate to the crime committed." *State v. Davis*, 206 Ariz. 377, 384, ¶ 32, 79 P.3d 64, 71 (2003) (invalidating statutorily-mandated consecutive 13-year prison terms imposed upon an immature 20-year-old defendant who stood convicted of three counts of sexual conduct with a minor for having non-coerced sex with two post-pubescent teenage girls who initiated sexual activity).

3. Just 3 years later, the Arizona Supreme Court distinguished *Davis* by rejecting an Eighth Amendment challenge to the imposition of 20 statutorily-mandated, consecutive 10-year prison terms against a defendant who stood convicted of 20 counts of sexual exploitation of a minor for possessing graphic images of child pornography. *State v. Berger*, 212 Ariz. 473, 480-82, ¶¶ 37-49, 134 P.3d 378, 385-87 (2006).

4. In *Berger*, the Arizona Supreme Court endeavored to resolve the tension between: (A) *Davis'* case-specific focus on the offender's *subjective* culpability and the circumstances of the offense for which he was convicted; and (B) Justice Kennedy's declaration that the controlling gross-disproportionality principle is itself informed by four *objective* factors—the primacy of the legislature, the variety of legitimate penological schemes, the nature of a federalist system, and the requirement that proportionality review be guided by objective factors to the maximum extent possible. Thus, the Arizona Supreme Court formulated the following bifurcated gross-proportionality inquiry:

> A court must *first* determine whether the legislature "has a reasonable basis for believing that [a sentencing scheme] 'advance[s] the goals of [its] criminal justice system in any substantial way.'" [*Ewing v. California*, 538 U.S. 11, 28 (2003) (quoting *Solem v. Helm*, 463 U.S. 277, 297 n.22 (1983))] (second and third alteration in original). In light of that conclusion, the court *then* considers if the sentence of the particular defendant is grossly disproportionate to the crime he committed. *Id*. A prison sentence is not grossly disproportionate, and a court need not proceed beyond the threshold inquiry, if it arguably furthers the State's penological goals and thus reflects "a rational legislative judgment, entitled to deference." *Id*. at 30 [ ]. This framework guides our review of [a defendant's] Eighth Amendment challenge to his sentence.

State v. Berger, 212 Ariz. 473, 477, ¶ 17, 134 P.3d 378, 382 (2006).

5. The first part of the Arizona Supreme Court's proportionality-review inquiry is effectively the rational-basis test—the reviewing court must identify which penological objectives the legislature sought to achieve by mandating certain sentences (i.e., deterrence, retribution, incapacitation, protecting children against sexual abuse) and then determine "whether the legislature has a reasonable basis for believing that a sentencing scheme advances the goals of its criminal justice system in any substantial way." *State v. Berger*, 212 Ariz. 473, 476-77, ¶¶ 14-17, 134 P.3d 378, 381-82 (2006). *Accord Ewing v. California*, 538 U.S. 11, 30 (2003) (upholding

California's three-strikes statute because "it reflects a *rational legislative judgment*, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated") (emphasis added); *Harmelin v. Michigan*, 501 U.S. 957, 1003-04 (1991) (Kennedy, J., concurring) (noting that the Michigan legislature had a "rational basis" for determining to impose mandatory life sentence for possession of more than 500 grams of cocaine); *State v. Russo*, 219 Ariz. 223, 227, ¶ 12, 196 P.3d 826, 830 (App.2008) (upholding fine based on "rational basis" for fining DUI offenders); *State v. Crego*, 154 Ariz. 278, 281, 742 P.2d 289, 292 (App.1986) ("It is sufficient that there is *a rational basis* for concluding that the sentences will help achieve a desired social objective.") (emphasis added) (quoting *State v. Carson*, 149 Ariz. 587, 588, 720 P.2d 972, 973 (App.1986)).

A. When performing the first part of the gross-disproportionality analysis, you may identify the legislative objectives or purposes served by the applicable sentencing range without explicit statements of legislative intent. *See State v. Wagstaff*, 164 Ariz. 485, 490-91, 794 P.2d 118, 123-24 (1990) ("The legislature's purpose in enacting the Dangerous Crimes Against Children Act *can be surmised*. Protecting the children of Arizona and punishing severely those who prey upon them certainly are two legislative goals.") (emphasis added). Prevailing rational-basis jurisprudence demonstrates that the proponents of a statute may defend its challenged provisions by articulating legitimate governmental interests that the legislature did not explicitly advance. While rejecting an equal-protection challenge to the statute criminalizing driving a vehicle with inert metabolites of illegal drugs, the Arizona Court of Appeals expounded upon this principle:

> There is another significant reason to find this statute comports with equal protection. We have held that we will sustain a statute under the rational basis test if it furthers **any** legitimate governmental interest. *See Lerma* [*v. Keck*], 186 Ariz. [228,] 233, 921 P.2d [28,] 33 [App.1996)] (in determining whether legislation furthers legitimate interest, court may consider legislature's actual purpose or hypothetical basis upon which it could have acted); *In re Lara*, 731 F.2d 1455, 1460 n.7 (9th Cir. 1984) (in determining rational basis for classification, reviewing court is not bound by justifications articulated by state at time of legislation's enactment). Hammonds' argument assumes that the only governmental interest implicated by section 28-692(A)(3) is the detection of impaired drivers and their removal from the roadways. To the extent that the statute is broader than necessary to achieve this objective, it arguably also has the effect of generally deterring illegal drug use, another legitimate governmental interest. That the legislature may have intended that the statute further such a secondary objective is evident in its decision to provide a "safe harbor" provision for those who operate vehicles with legal prescription drugs in their bodies. *See* A.R.S. § 28-692(B) (providing that a prescription for a drug in question is an affirmative defense to a charge of driving with a drug or metabolite in the body, so long as the

> driver is not actually impaired by the prescription drug). This secondary objective buttresses our conclusion that section 28-692(A)(3) is a rational exercise of legislative power.

State v. Hammonds, 192 Ariz. 528, 531-32, ¶ 12, 968 P.2d 601, 604-05 (App.1998) (emphasis in original). *Accord Lerma v. Keck*, 186 Ariz. 228, 233, 921 P.2d 28, 33 (App.1996) ("In determining whether the legislation rationally furthers a legitimate purpose, we may consider either the legislature's *actual* purpose or any *hypothetical* basis upon which it could have acted.") (emphasis in original) (citing *Church v. Rawson Drug & Sundry Co.*, 173 Ariz. 342, 350, 842 P.2d 1355, 1363 (App.1992)).

B. Arizona has substantial precedent identifying the penological objectives that the Legislature sought to achieve when it passed the Dangerous Crimes Against Children Act. *See State v. Berger*, 212 Ariz. 473, 478, ¶¶ 20–22, 134 P.3d 378, 383 (2006). ("This legislation provides lengthy periods of incarceration ... intended to punish and deter those predators who pose a direct and continuing threat to the children of Arizona.") (internal quotation marks and citation omitted); *State v. Williams*, 175 Ariz. 98, 102-03, 854 P.2d 131, 135-36 (1993) ("The lengthy periods of incarceration are intended to punish and deter those persons, and simultaneously keep them off the streets and away from children for a long time. The special penalties … are calculated to deal with persons peculiarly dangerous to children."); *State v. Wagstaff*, 164 Ariz. 485, 490-91, 794 P.2d 118, 123-24 (1990) ("The legislature's purpose in enacting the Dangerous Crimes Against Children Act can be surmised. Protecting the children of Arizona and punishing severely those who prey upon them certainly are two legislative goals. In addition . . . the legislature is attempting to address the problem of recidivism alleged to exist in this category of offender."); *State v. Tsinnijinnie*, 206 Ariz. 477, 478, ¶ 8, 80 P.3d 284, 285 (App.2004) ("The legislature intended to impose severe punishments for dangerous crimes committed against children less than the age of 15."); *Boynton v. Anderson*, 205 Ariz. 45, 48, ¶ 12, 66 P.3d 88, 91 (App.2003) ("The Dangerous Crimes Against Children Act, as interpreted by our appellate courts, sets forth a clear, unmistakable, and resolute public policy intended to protect our children.").

C. Insofar as legislation prohibiting the mere possession of child pornography, the Legislature set forth its policy objectives Arizona Supreme Court recognized the following policy objectives for mandating the imposition of a consecutive sentence of no less than 10 years per visual depiction:

> Criminalizing the possession of child pornography is tied directly to state efforts to deter its production and distribution. Given that the distribution and production of this material occurs "underground," the legislature must be permitted to "stamp out this vice at all levels in the

> distribution chain." *Osborne v. Ohio*, 495 U.S. [103,] 110 [(1990)]. Moreover, criminalization encourages the destruction of such materials. Id. at 111 [ ]. The goal of combating the sexual abuse and exploitation inherent in child pornography animates Arizona's severe penalties for the possession of such material

State v. Berger, 212 Ariz. 473, 477, ¶ 19, 134 P.3d 378, 382 (2006).

D. Numerous courts, including the Supreme Court, have recognized the necessity of severely penalizing all persons involved in this industry—producer and consumer alike—to advance these goals. *See Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990) ("It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."); *New York v. Ferber*, 458 U.S. 747, 759-60 (1982) ("Indeed, there is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies."); *United States v. MacEwan*, 445 F.3d 237, 250 (3rd Cir. 2006) ("Moreover, Congress found little distinction in the harm caused by a pedophile, be he a distributor or mere consumer in child pornography, because the mere existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear and present danger to all children."); *United States v. Forrest*, 429 F.3d 73, 79 (4th Cir. 2005) ("[P]rohibiting the possession and viewing of child pornography will ... help[ ] to protect the victims of child pornography and to *eliminate the market* for the exploitative use of children.") (emphasis in original); *United States v. Sherman*, 268 F.3d 539, 545 (7th Cir. 2001) ("[C]onsumers of child pornography instigate its production by providing an economic motive for creating and distributing the materials."); *United States v. Norris*, 159 F.3d 926, 930 (5th Cir. 1998) ("The consumers of child pornography therefore victimize the children depicted ... by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects."); *State v. Emond*, 163 Ariz. 138, 142-43, 786 P.2d 989, 993-94 (App.1989) ("Drying up the market may be the only way to effectively combat the production [of child pornography].") (quoting *United States v. Anderson*, 813 F.2d 903, 907 n.3 (7th Cir. 1986)).

E. As many courts have recognized, this deterrent effect is amplified by imposing stiff sentences for otherwise difficult-to-detect sex crimes against children. *See United States v. Goff*, 501 F.3d 250, 261 (3rd Cir. 2007) ("The logic of deterrence suggests that the lighter the punishment for downloading and uploading child pornography, the greater the customer demand for it and so the more will be produced.") (quoting *United States v. Goldberg*, 491 F.3d 668, 672 (7th Cir. 2007)); *United States v. McElheney*, 524 F.Supp.2d 983, 1005 (E.D.Tenn.2007) ("Deterrence is a particularly relevant consideration in child pornography cases."); *Adaway v. State*, 902 So.2d 746, 750-51 (Fla.2005)

("Because victims hesitate to report this crime and proof of the offense is often difficult to obtain, there is a risk that perpetrators will believe they can escape detection and punishment. As a result, there is a need for a harsh penalty to act as a sufficient deterrent."); *People v. Huddleston*, 816 N.E.2d 322, 341 (Ill.2004) (justifying severe sentences for crimes against young children on the ground "others might be deterred by the lengthy sentences of those incarcerated").

F. The rational-basis test does not require proof that the statute's means is most narrowly tailored to its objective:

> Under the rational basis test, the legislature need not choose the least intrusive, nor most effective, means of achieving its goals. *See Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 491 [ ] (1977) (holding that statute was not irrational simply because it provides only "rough justice"). Rather, a statute offends equal protection only if it is "wholly irrelevant" to the achievement of a legitimate governmental objective. *McGowan v. Maryland*, 366 U.S. 420, 425 [ ] (1961).

State v. Hammonds, 192 Ariz. 528, 532, ¶ 15, 968 P.2d 601, 605 (App.1998).

G. The Arizona Court of Appeals applied these principles to reject an equal-protection challenge to classifying possession of child pornography a class 2 dangerous crime against children, based upon the legislature's classification of indecent exposure as a class 5 felony, and the production of child pornography as a class 2 dangerous crime against children:

> The legal standard applicable to the legislature's distinctions between one who possesses child pornography and one who engages in acts of indecent exposure, and between one who engages in the sexual exploitation of a minor and one who engages in the commercial sexual exploitation of a minor, is the same: whether there is a rational basis for the distinction given that the statutory design implicates neither a suspect class nor a fundamental right. *See City of Tucson v. Pima County*, 199 Ariz. 509, 516 ¶ 21, 19 P.3d 650, 657 (App.2001).

> Rational basis review imposes on Petitioners, as the parties challenging the constitutionality of the Act, the burden of establishing that the law is unconstitutional by demonstrating that there is no conceivable basis for the Act. A legislative enactment challenged under the rational basis test will pass constitutional muster unless it is proved beyond a reasonable doubt to be wholly unrelated to any legitimate legislative goal. Moreover, the law "need not be in every report logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and th[at] it might be thought that the particular legislative measure was a rational way to correct it."

Martin [*v. Reinstein*], 195 Ariz. [293,] 309–10 ¶ 52, 987 P.2d [779,] 795–96 [(App.1999)] (citations omitted); *see State v. Smith*, 166 Ariz. 450, 453, 803 P.2d 443, 446 (App.1990) (A statute fails if its classification is based on reasons "wholly irrelevant to the achievement of the state's objectives.") (Quoting *Bryant v. Cont'l Conveyor Equip. Co.*, 156 Ariz. 193, 196–97, 751 P.2d 509, 512–13 (1988)); *State v. Hammonds*, 192 Ariz. 528, 531 ¶ 8, 968 P.2d 601, 604 (App.1998) ("[A] statute must be rationally related to furthering a legitimate governmental interest."); *State v. McInelly*, 146 Ariz. 161, 163, 704 P.2d 291, 293 (App.1985) (If the legislative reasoning is related to public health, safety or welfare, we will not question the legislature in passing the statute.).

"It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Osborne v. Ohio*, 495 U.S. 103, 109 [ ] (1990) (quoting *New York v. Ferber*, 458 U.S. 747, 756–58 [ ] (1982)). The legislature's designation of possession of child pornography as a class 2 felony and dangerous crime against children is a legitimate statement from Arizona's elected representatives about the harm caused by such materials; it does not violate equal protection.

As to Berger's first contention, the class of persons who engage in acts of indecent exposure does pose a different harm than does the class of persons who possess child pornography. Contrary to an act of indecent exposure, which ends upon completion of the act, the victimization of a child continues when that act is memorialized in an image. *See Ferber*, 458 U.S. at 759, 102 S.Ct. 3348 ("[T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." (Footnote omitted)); *United States v. Norris*, 159 F.3d 926, 929 (5th Cir. 1998), *cert. denied*, 526 U.S. 1010 [ ] (1999) ("Unfortunately, the 'victimization' of the children involved does not end when the pornographer's camera is put away."). "The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *Osborne*, 495 U.S. at 109 [ ] (quoting *Ferber*, 458 U.S. at 756–58 [ ]); *see State v. Hazlett*, 205 Ariz. 523, 527 ¶ 11, 73 P.3d 1258, 1262 (App.2003) ("The crime is the abuse of the children." (Footnote omitted.)).

As to Berger's second contention, it is reasonable for the state legislature to conclude that the possession of child pornography drives that industry and that the production of child pornography will decrease if those who possess the product are punished equally with those who produce it. *See Osborne*, 495 U.S. at 109–110 [ ] ("It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing

demand."); *id*. at 111 [ ] ("The State's ban on possession and viewing encourages the possessors of these materials to destroy them."); *Ferber*, 458 U.S. at 756–64 [ ] (discussing reasons for prohibiting child pornography, including economic motive); *Norris*, 159 F.3d at 930 ("[T]here is no sense in distinguishing ... between the producers and the consumers of child pornography. Neither could exist without the other."); *United States v. Ketcham*, 80 F.3d 789, 793 (3rd Cir. 1996) (Statute making criminal "subsequent transportation, distribution, and possession of child pornography discourages its production by depriving would-be producers of a market."); *State v. Taylor*, 160 Ariz. 415, 420, 773 P.2d 974, 979 (1989) (By penalizing possession and production equally, the legislature "convey[s] a statutory intent that the consumer of child pornography be dealt with severely."); *State v. Emond*, 163 Ariz. 138, 142, 786 P.2d 989, 993 (App.1989) ("[D]rying up the market is the only way to effectively combat the production of child pornography."). As the federal legislature has found, the possession of child pornography "inflames the desires of child molesters, pedophiles, and child pornographers." *Norris*, 159 F.3d at 930 (quoting Child Pornography Prevention Act of 1996, Pub.L. 104–208, § 121, 110 Stat. 3009–27); *see also Osborne*, 495 U.S. at 111 [ ] ("Evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." (Footnote omitted.)).

The State has more than a passing interest in forestalling the damage caused by child pornography; preventing harm to children is, without cavil, one of its most important interests. *See, e.g., Osborne*, 495 U.S. at 110–111 [ ] ("Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault [the State] for attempting to stamp out this vice at all levels in the distribution chain.... Indeed, 19 States have found it necessary to proscribe the possession of this material." (Footnote omitted.)). The legislature's designation of possession of child pornography as a more serious offense than the act of indecent exposure FN5 and its refusal to distinguish between the commercial and non-commercial sexual exploitation of minors is rationally related to furthering the State's interest in protecting children. Berger's constitutional guarantees of equal protection are not violated.

> FN5. It is more than legitimate for the legislature to so distinguish between the offenses of possession of child pornography, a class 2 felony, and indecent exposure, a class 6 felony; indeed, there is no parallel. The crime of indecent exposure has been denominated by the legislature as a lesser felony because the act, while intentional, is performed with a reckless disregard to the nature of the offense. The possession of images in which children perform or adults respond to children with acts of indecent exposure is a societal harm of a proportionately greater degree.

State v. Berger, 209 Ariz. 386, 389-90, ¶¶ 7-12, 103 P.3d 298, 301-02 (App.2004), *vacated in part on other grounds*, 212 Ariz. 473, 134 P.3d 378 (2006). *See also State v. McPherson*, 228 Ariz. 557, 562-65, ¶¶ 17-24, 269 P.3d 1181, 1186-89 (App.2012).

6. The Arizona Supreme Court clarified that the subjective sub-component its gross-disproportionality inquiry requires consideration of the specific offender and the crime's circumstances for only two limited purposes: (A) to determine whether the Legislature enacted the sentencing statute at issue with the defendant's alleged conduct in mind; and (B) to ascertain "the defendant's degree of culpability for the offense" by determining whether he "consciously sought to do exactly that which the legislature sought to deter and punish," not whether "the defendant is, apart from the crime at issue, a good person or a promising prospect for rehabilitation." *State v. Berger*, 212 Ariz. 473, 481-82, ¶¶ 39-47, 134 P.3d 378, 386-87 (2006). If the defendant's conduct rests "at the core, not the periphery, of the prohibitions of the [statute at issue]," the reviewing court must defer to the legislature and uphold the statutorily-mandated penalty. *Id*. at 481, ¶ 44, 134 P.3d at 386. Conversely, if the "objective factors about the offenses indicated that the defendant's conduct was at the edge of the statute's broad sweep of criminal liability," then the statutorily-mandated sentence is entitled to less deference, especially when the reviewing court "[can]not reconcile the particular sentences imposed with any reasonable sentencing policy it could attribute to the legislature." *Id*. at 481, ¶ 41, 134 P.3d at 386.

7. *Davis* and *Berger* provide good illustrations of when a defendant's conduct rests "at the core, not the periphery," of the conduct prohibited by the criminal statute he violated. *Compare State v. Davis*, 206 Ariz. 377, 380, 384, ¶¶ 7-10, 32, 79 P.3d 64, 67, 71 (2003) (holding that three consecutive 13-year prison terms was unconstitutional as applied to a 20-year-old defendant of below average intelligence convicted of having consensual sex with two 14-year-old girls, where the defendant would not have been criminally liable had his victims been 15 or older and had he been within 2 years of their age), *with State v. Berger*, 212 Ariz. 473, 482, ¶ 49, 134 P.3d 378, 387 (2006) (upholding 20 consecutive 10-year sentences imposed upon a mature, married, 52-year-old high school teacher who knowingly sought and possessed numerous graphic images of child pornography over a 6-year period).

The following excerpts from *Berger* are worth replicating here:

> Berger nonetheless argues that our holding in *Davis* compels the vacating of his sentence. In Davis, this court vacated four consecutive thirteen-year sentences imposed on a twenty-year-old man of below average intelligence convicted of having uncoerced sex at different times with two fourteen-year-old girls. 206 Ariz. at 380, ¶¶ 7–10, 79 P.3d at 68.
>
> *Davis* represents an "extremely rare case" in which the court concluded prison sentences were grossly disproportionate. In so holding, the court observed that a sentence violates the Eighth Amendment if it is "so severe as to shock the

conscience of society." Id. at 388, ¶ 49, 79 P.3d at 75 (quotation omitted). This language, however, must be understood as a restatement of the court's conclusion that the sentences were "grossly disproportionate" under the standard set forth in the plurality opinions in Harmelin and Ewing, which Davis expressly followed. Davis was not suggesting a different standard by its use of the phrase "shock the conscience of society." [Footnote omitted.]

Davis acknowledged, and we here reaffirm, that a sentencing scheme that does not violate the Eighth Amendment in its general application may still, in its application to "the specific facts and circumstances" of a defendant's offense, result in an unconstitutionally disproportionate sentence. *Id*. at 384, ¶ 34, 79 P.3d at 71. Berger, however, misunderstands how the "specific facts and circumstances of the offenses" enter into the Eighth Amendment analysis under *Davis*.

The court in *Davis* effectively concluded that it could not reconcile the particular sentences imposed with any reasonable sentencing policy it could attribute to the legislature. Most significantly, the defendant in Davis, who had no prior criminal record, was caught up in the "broad sweep" of a statute that made no distinction between the perpetrators of incest, serial pedophiles, and an eighteen-year-old man engaging in sex initiated by a fifteen-year-old girlfriend. *Id*. at 384–85, ¶¶ 36–37, 79 P.3d at 71–72. The statute's breadth in terms of imposing liability was coupled with a sentencing scheme mandating lengthy consecutive sentences for each offense. *Id.* at 385, ¶ 37, 79 P.3d at 72.

In *Davis*, objective facts about the offenses indicated that the defendant's conduct was at the edge of the statute's broad sweep of criminal liability. Davis was twenty years old and his maturity and intelligence fell far below that of a normal adult. Id. at 384–85, ¶ 36, 79 P.3d at 71–72. The girls involved not only participated willingly, but they had sought Davis out and gone voluntarily to his home. Id. If the girls had been fifteen or older and Davis within two years of their age, he would not have been criminally liable at all. A.R.S. § 13–1407(F). But because his conduct was "swept up in the broad statutory terms," Davis, 206 Ariz. at 385, ¶ 37, 79 P.3d at 72, Davis was subject to four consecutive thirteen-year sentences.

Only after concluding that objective factors about Davis's offense showed he had been caught up in the expansive reach of the statute did the court determine that the consecutive nature of his sentences was relevant to the Eighth Amendment analysis. *Id*. at 387, ¶ 47, 79 P.3d at 74. In so doing, however, the court noted that its conclusion rested on the "specific facts and circumstances of Davis's offenses," and reaffirmed that the court "normally will not consider the imposition of consecutive sentences in a proportionality inquiry...." *Id*. at 387–88, ¶¶ 47–48, 79 P.3d at 74–75.

> ¶ 43 Berger argues that, in light of *Davis*, the court must consider the consecutive nature of his sentences in the Eighth Amendment analysis, along with the "victimless" nature of his crime, and that this court must, at the least, order a re-sentencing hearing so he can present "mitigation evidence."
>
> Berger's conduct is at the core, not the periphery, of the prohibitions of A.R.S. § 13–3553(A)(2)—the knowing possession of visual depictions of sexual conduct involving minors—and he, unlike Davis, cannot be characterized as someone merely "caught up" in a statute's broad sweep. Thus, there is no basis here to depart from the general rule that the consecutive nature of sentences does not enter into the proportionality analysis.
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> …
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> Further, Berger has not identified any fact that he might offer on remand that would alter our conclusion that his sentences are not grossly disproportionate. At the time of his arrest, Berger was a fifty-two-year-old high school teacher, was married, and had no prior criminal record. These facts, which are in the record, do not reduce his culpability. The trial evidence showed that Berger knowingly sought and possessed numerous items of contraband child pornography over an extended period of time. Accordingly, considering "the specific facts and circumstances" of Berger's crimes only amplifies the conclusion that he consciously sought to do exactly that which the legislature sought to deter and punish. *See Seritt v. Alabama*, 731 F.2d 728, 737 (11th Cir. 1984) (rejecting habeas claimant's argument for an evidentiary hearing when circumstances of the crime were demonstrated in the record).

State v. Berger, 212 Ariz. 473, 480-82, ¶¶ 37-44, 49, 134 P.3d 378, 385-87 (2006).

8. If the court does find an inference of gross-disproportionality, intra-jurisdictional comparative analysis comes into play and requires the State to cite other criminal offenses in Arizona having sentencing ranges that are equal to or more severe than the defendant's crimes of conviction. During the course of collating these other criminal offenses, it will become evident that the legislature prescribed lesser or equal sentences for crimes of greater severity than the offenses for which the defendant was sentenced. Should your opponent make this point to the court, remind the court that the Eighth Amendment does not require "precise calibration of crime and punishment," *United States v. Polk*, 546 F.3d 74, 76 (1st Cir. 2008), and that "[t]he Constitution does not require legislatures to balance crimes and punishments according to any single standard, or to achieve perfect equipoise." *United States v. Saccoccia*, 58 F.3d 754, 788 (1st Cir. 1995). The Arizona Supreme Court articulated the rationale underlying this proposition while rejecting a far more meritorious contention:

> While it is true that A.R.S. § 13–1206 mandates the most severe prison sentence available in our criminal code, that no other conduct not

> involving homicide requires a life sentence and equally grave crimes are punished less severely, and that a substantially similar and possibly more dangerous crime is punished much less severely, it does not follow that A.R.S. § 13–1206 violates the federal and state constitutions. Disproportionality "is, of course, a question of degree. The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible. The judiciary, accordingly, should not interfere in this process unless a statute prescribes a penalty 'out of all proportion to the offense.'"

State v. Mulalley, 127 Ariz. 92, 97, 618 P.2d 586, 591 (1980) (quoting *In re Lynch*, 503 P.2d 921, 930 (Cal.1972)). *See also Harmelin v. Michigan*, 501 U.S. 957, 989 (1991) (Scalia, J., lead opinion) ("Moreover, even if 'similarly grave' crimes could be identified, the penalties for them would not necessarily be comparable, since there are many other justifications for a difference. For example, since deterrent effect depends not only upon the amount of the penalty but upon its certainty, crimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties. Grave crimes of the sort that will not be deterred by penalty may warrant substantially lower penalties, as may grave crimes of the sort that are normally committed once in a lifetime by otherwise law-abiding citizens who will not profit from rehabilitation."); *People v. Preciado*, 116 Cal.App.3d 409, 412 (1981) ("Punishment is not cruel and unusual, however, merely because the Legislature may have chosen to impose lesser punishment for another crime. 'Leniency as to one charge does not transform a reasonable punishment into one that is cruel and unusual.'") (quoting *People v. Gaythe*r, 110 Cal.App.3d 79, 89 (1980)).

9. Turning finally to inter-jurisdictional comparative analysis, the following cases are applicable in the (likely) event that Arizona's sentencing range for sex crimes rank at the top of the national spectrum: *See Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) ("Diversity not only in policy, but in the means of implementing policy, is the very raison d'être of our federal system. … The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.") (Scalia, J., lead opinion); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984) ("The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws."); *Rummel v. Estelle*, 445 U.S. 263, 281 (1980) ("Even were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other States."); *id.* at 282 ("Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."); *Cocio v. Bramlett*, 872 F.2d 889, 897 (9th

Cir. 1989) ("As explained above, the statutes from other states discussed in this section do not enhance the sentence for those persons who commit violent felonies while on probation following a prior felony conviction. The fact that Arizona has determined that this is a relevant consideration in assessing punishment does not make the sentence disproportionate."); *State v. Lammie*, 164 Ariz. 377, 383, 793 P.2d 134, 140 (App.1990) (holding that sex-offender registration statute, even if unique to Arizona, would be constitutional because "[t]o hold otherwise would make it virtually impossible for a state to be on the leading edge in passing laws increasing punishment for criminal offenses," because "[s]uch a holding would require simultaneous passage of similar laws in more than one state," which would be improbable); *State v. Carson*, 149 Ariz. 587, 588, 720 P.2d 972, 973 (App.1986) ("A legislative body may mandate minimal jail terms for conduct made criminal. To do so, it is required neither to mandate such terms for all offenses nor wait until all jurisdictions have similarly acted."). *Williams v. State*, 539 A.2d 164, 179 (Del.1988) (finding no Eighth Amendment violation found, even though "[o]nly in Delaware could a mandatory life term of imprisonment without the possibility of parole be imposed for a third daytime residential burglary"); *State v. McKnight*, 576 S.E.2d 168, 177 (S.C.2003) (same result where South Carolina was the only state to criminalize fetal death caused by a pregnant mother's cocaine abuse).

10. In child pornography cases, Justice Hurwitz's concurring opinion indicates that extended proportionality analysis would not manifest an Eighth Amendment violation:

> Nor can I conclude that inter-jurisdictional comparisons demonstrate that the penalty Berger received for a single count is disproportionate to the penalty that could be imposed elsewhere for a single such offense. The federal sentencing guidelines in effect when Berger was sentenced recommended a sentence of fifty-seven to seventy-one months for possession of one (or more) proscribed depictions, but the governing statute allowed a sentence of up to fifteen years for one offense. [Footnote omitted.] As Justice Berch notes, at least nine other states allow (but do not require) a 10-year penalty, and four states permit a greater penalty. Such is not the stuff of gross disproportionality.

State v. Berger II, 212 Ariz. 473, 484, ¶ 56, 134 P.3d 378, 389 (2006) (Hurwitz, J., concurring).

In the answer filed on February 23, 2010, in response to Berger's petition for writ of habeas corpus, the State provided the district court with the following survey of the nation's child-pornography laws and noted that, if anything, the national trend is moving towards *increasing* the penalties for child pornography possession:

> As of today, Congress and six state legislatures have prescribed sentencing ranges that permit the imposition of prison terms *exceeding* the 10-year prison term that Petitioner received for each violation of A.R.S.

§ 13–3353.[1] And, at least 10 other states and Congress have enacted sentencing statutes that permit the imposition of 10-year prison terms as the maximum punishment for simple possession of child pornography.[2]

The fact that Petitioner's 10-year prison term fell within the sentencing ranges of other jurisdictions—albeit often at the high end of the spectrum—is sufficient to demonstrate that his sentence was not cruel and

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[1] *See* 18 U.S.C. § 2252(a)(2) & (b)(1) (2008) (5-to-20 year sentence for any person who "knowingly receives … any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means including by computer"); Fla. Stat. Ann. §§ 827.071(5), 827.847(2) & (3)(a), 775.082 (2007) (amendment allows elevation from third to second-degree punishment the possession of child pornography depicting children under 5 years of age, sadomasochistic abuse, sexual battery, bestiality, or motion pictures, thereby increasing penalty from maximum sentence of 5 years to 15 years); Ga. Code Ann. § 16–12–100(b)(8) & (g)(1) (2003) (elevating classification from a class 1 misdemeanor to a felony punishable between 5 and 20 years); Miss. Code Ann. §§ 97–5–33 and 97–5–35 (2005) (increasing the 2-to-20 year sentencing range to 5-to-40 years' imprisonment); Neb. Rev. St. § 28–813.01 & (2)(b) (2009) (reclassifying child pornography possession by persons older than 18 years of age, formerly a class IV felony punishable by a maximum 5-year term, as a Class III felony subject to § 28–105's range of 1-to-20 years); N.H. Rev. Stat. § 649–A:3(I) & (II) (2009) (reclassifying possession of child sexual abuse images by a first-time offender, formerly a class B felony punishable by a maximum of 7 years, as a class A felony subject to § 651:2(II)(a)'s maximum 15-year prison term); Utah Code Ann. §§ 76–5a–3, 76–2–203(2) (1956) (prison range of 1 to 15 years per child depicted); Wisconsin Stat. Ann. § 948.12(1m) & (3)(a) (2006) (reclassifying possession by defendants over 18 years of age, formerly as Class I felony subject to § 973.01(I)'s maximum sentence of 1 year and 6 months, as a Class D felony punishable by a prison term not to exceed 15 years, pursuant to § 973.01(D)). It should be noted that Florida, Nebraska, and New Hampshire enacted their elevated sentencing ranges in the years following the Arizona Supreme Court's decision in this case.

Since filing this answer on February 23, 2010, at least two other legislatures increased their state's sentences for this crime. *See* Alaska Stat. §§ 11.61.127(a), 12.55.125(i)(4)(A); (2008) (2 to 12 years for first offense); Mont. Code Ann. §§ 45-5-625 (1)(e) & (4)(a) (2007) (100 years, with parole after 25, for child under 12 years).

[2] *See* 18 U.S.C. § 2252(a)(4) & (b)(1) (imposing a 5-to-10 year range for any person who "knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer"); Ala. Code 1975, §§ 13A–12–192 & 13–5–6 (1-to-10 year range); Ark. Code Ann. §§ 5–27–304 & 5–27–304 (designating first offenses as class C felonies punishable by prison terms ranging between 3 and 10 years); Idaho Code Ann. § 18–1507(A) (2006) (doubling maximum sentence for non-commercial possession to 10 years' imprisonment); La.Stat.Ann.–Rev.Stat. §§ 14:81.1(A)(3) & (E)(1) (mandatory 2-to-10 year prison terms without possibility of parole); Mont. Code Ann. §§ 45–5–625(1)(e), (2)(c) (10-year maximum sentence); S.C. Code Ann. § 16–15–410 (2004) (doubled sentence for third-degree sexual exploitation to 10 years' imprisonment); South Dakota Codified Laws § 22–24A–3(3) (2005) (elevating crime from class 6 felony punishable by maximum 2-year prison term to a class 4 felony having a 10-year maximum sentence); Vernon's Tex. Code Ann. §§ 12.34 & 43.26 (no more than 10 years); Revised Code Wash. §§ 9.68A.070 & 9A.20.21 (2006) (increasing classification from Class C felony punishable by 5-year maximum to a Class B felony having a 10-year maximum sentence); Wyo. Stat. 1977 Ann. § 6–4–303.7 (maximum term of 10 years).

unusual punishment. "The Eighth Amendment does *not* require *strict* proportionality between crime and sentence. Rather, it forbids only extreme sentences that are *grossly disproportionate* to the crime." *Ewing*, 538 U.S. at 23 (emphasis added). *Accord Andrade*, 538 U.S. at 77 ("The gross disproportionality principle reserves a constitutional violation for only the extraordinary case.").

Although *Ewing*, *Harmelin* and *Rummel* foreclose extended comparative analysis in this case because no threshold inference of gross disproportionality exists, a survey of the Nation's child-pornography laws manifests a clear legislative trend inimical to Petitioner's Eighth Amendment claim. Whereas at least 24 states have enacted statutes *increasing* the sentencing ranges for simple possession of child pornography since 2002, *none* have decreased their punishment for this crime.[3] Although some states have elected to make only incremental

[3] *See* Colo. Rev. Stat. Ann. §§ 18–6–403(5)(b) & 18–1.3–401(V)(A) (2006) (elevating possession of one image from class 1 misdemeanor status to class 6 felony punishable between 1 and 1.5 years, and designating possession of 20 or more images or one motion picture as a class 4 felony punishable between 2 and 6 years); Conn. Gen. Stat. Ann. § 53a–196 (2007) (classifying as a Class B felony punishable between 5 and 20 years' imprisonment the possession of more than 50 images, a Class C felony punishable between 3 and 10 years' imprisonment the possession of between 20 and 50 images, and a Class D felony punishable by 2 to 5 years' imprisonment the possession of less than 20 images); Conn. Gen. Stat. Ann. § 53a–196d (2004) (increasing the sentence for possessing child pornography, a class D felony, punishable by 2 to 5 years' imprisonment, by: (1) elevating the offense to a class B felony, punishable by 1 to 20 years' imprisonment, if the person knowingly possesses 50 or more visual depictions; (2) elevating the offense to a class C felony, punishable by 1 to 10 years, if the person knowingly possesses 20 to 49 photographs); Fla. Stat. Ann. §§ 827.071(5), 827.847(2) & (3)(a), 775.082 (2007) (amendment allows elevation from third to second-degree punishment the possession of child pornography depicting children under 5 years of age, sadomasochistic abuse, sexual battery, bestiality, or motion pictures, thereby increasing penalty from maximum sentence of 5 years to 15 years); Ga. Code Ann. § 16–12–100(b)(8) & (g)(1) (2003) (elevating classification from a class 1 misdemeanor to a felony punishable between 5 and 20 years); Idaho Code Ann. § 18–1507(A) (2006) (doubling maximum sentence for non-commercial possession to 10 years' imprisonment); 720 ILCS [Illinois Comp. Stat.] §§ 5/11–20.3(a)(2) & (c)(2), 5/5–8–1(5) (2010) (new statute designating as class 2 felony aggravated child pornography involving children under 13, thereby increasing penalty from class 3 range of 2-to-5 years to 3-to-7 years); Ind. Code Ann. § 35–42–4–4 (2002) (reclassified this crime, formerly a misdemeanor, as a class D felony, punishable by 6 months to 3 years); Ky. Penal Code §§ 531.335(2) & 532.060(2)(d) (2006) (increasing simple possession from class A misdemeanor status to a class D felony punishable between 1 and 5 years' imprisonment); Me. Rev. Stat. Ann. Tit. 17–A § 284 (2004) (formerly classified a first offense involving a child under 14 as a class D felony punishable by less than 1 year, and a second offense as a class C felony punishable up to 5 years, but now punishes the possession of images of children under 12 as a class C felony); Md. Code Ann. § 11–208(a) & (b) (2009) (reclassifying possession of images of children under 16 years of age, labeled a "misdemeanor" punishable up to 2 years' imprisonment, as a "misdemeanor" punishable up to 5 years); Miss. Code Ann. §§ 97–5–33 and 97–5–35 (2005) (increasing the 2-to-20 year sentencing range to 5-to-40 years' imprisonment); Mo. Rev. Stat. § 573.037(1) (2008) (classifying possession of 20 or more images as a class B felony, punishable under § 558.011 between 5 and 15 years' imprisonment); Mo. Rev. Stat. § 573.037 (2004) (changing former classification of a first offense as a misdemeanor as a class D felony punishable by 1 to 4 years); Neb. Rev. St. § 28–813.01 & (2)(b) (2009) (reclassifying child pornography possession by persons older than 18 years of age—formerly a class IV felony in 2004 punishable by a maximum 5-year term and a class 2 misdemeanor before 2004—as a Class III felony subject to § 28–105's range of 1-to-20 years); Nev. Rev. Stat. Ann. § 200.730 (2005) (increasing the sentence for "any subsequent offense" of possessing any film or photograph of a child under 16 years of

> amendments to their child-pornography sentencing statutes, many other states—such as Connecticut, Florida, Georgia, Mississippi, Missouri, Nebraska, New Hampshire, Tennessee, Washington, and Wisconsin—ventured much further by either revising their statutes more than once within a decade, effecting dramatic increases in punishment, or enacting completely new statutes to impose greater punishment for possessing images that depict extremely young children, rape, or bestiality. Regardless of the varying speeds of legislative change within our Nation's federalist system, it is indisputable that Arizona's sister states are moving *towards*, *not away*, from the Arizona Legislature's policy determination that severely punishing consumers of child pornography is the best way to stamp out this pernicious industry.

Caveat: Because this passage reflects the state of the law several years ago, you should update these findings with supplemental legislative research.

11. Inter-jurisdictional analysis of the sentences imposed nationwide for sexual offenses involving children 12 years of age or younger actually supports our position that life sentences without parole eligibility after 35 years is constitutional. My limited research reveals that several other jurisdictions, including Alabama, Arkansas, Georgia, Florida, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Mississippi, North Carolina, Ohio, Rhode Island, Tennessee, and Utah, either permit or mandate sentences of life without parole or a term of years exceeding the defendant's life expectancy.[4]

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age from 1 to 10 years' imprisonment to 1 year to life imprisonment with the possibility of parole); N.H. Rev. Stat. § 649–A:3(I) & (II) (2009) (reclassifying possession of child sexual abuse images by a first-time offender, formerly a class B felony punishable by a maximum of 7 years, as a class A felony subject to § 651:2(II)(a)'s maximum 15-year prison term); N.J.S.A. 2C:24–4(b)(5)(b) & 2C:43–6 (2005) (formerly classifying possession of images of children under 16 as fourth degree crime punishable by less than 18 months as third degree felonies punishable by 3 to 5 years' imprisonment); N.C. Gen. Stat. Ann. §§ 14–190.17A & 15A–1340.17 (increasing felony designation from Class I to Class H, and substituting former range of 3 to 12 months with range of 4 to 25 months); N.D. Laws §§ 12.1–27.2–04.1 & 12.1–32–01(3) (2007) (increasing classification from class A misdemeanor punishable by 1 year to a class C felony punishable up to 5 years' imprisonment); S.C. Code Ann. § 16–15–410 (2004) (doubled sentence for third-degree sexual exploitation to 10 years' imprisonment); South Dakota Codified Laws § 22–24A–3(3) (2005) (elevating crime from class 6 felony punishable by maximum 2-year prison term to a class 4 felony having a 10-year maximum sentence); Vernon's Tenn. Code Ann. § 39–17–1003 (2005) (increasing the sentence for sexual exploitation from a Class E felony, punishable between 1 and 6 years, by elevating the base offense to a class D felony punishable between 2 and 12 years; punishing the possession of 50 to 99 images as a class C felony punishable between 3 and 15 years; and punishing the possession of 100 or more images as a class B felony punishable by 8 to 30 years); Va. Code Ann. § 18.2–374:1.1 (2004) (reclassified the crime of possession of child pornography, formerly a misdemeanor as a class 6 felony for a first offense, punishable by a term of imprisonment between 1 and 5 years); Revised Code Wash. §§ 9.68A.070 & 9A.20.21 (2006) (increasing classification from Class C felony punishable by 5-year maximum to a Class B felony having a 10-year maximum sentence); Wisconsin Stat. Ann. § 948.12(1m) & (3)(a) (2006) (reclassifying possession by defendants over 18 years of age, formerly as Class I felony subject to § 973.01(I)'s maximum sentence of 1 year and 6 months, as a Class D felony punishable by a prison term not to exceed 15 years, pursuant to § 973.01(D)).

[4] *See* Ala. Code § 13A-6-61, 13A-6-63 (sodomy in the first degree on a child under 12 is

III. Points to recall during the threshold gross-disproportionality phase.

1. Remind the court that crimes against children are very serious crimes because of their long-enduring and severe repercussions that the victims suffer. "Our legislature has determined that those commit sexual crimes against children are the most heinous of offenders." *State v. Crego*, 154 Ariz. 278, 280, 742 P.2d 289, 291 (App.1986). *See also New York v. Ferber*, 458 U.S. 747, 757 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."); *United States v. Farley*, 607 F.3d 1294, 1345 (11th Cir. 2010) ("The Supreme Court, this Court, and other courts have expounded at length on the severity of crimes involving the sexual abuse of children and the extent of the harm caused by those crimes.") (collecting cases); *United States v. Pugh*, 515 F.3d 1179, 1202 (11th Cir. 2008) ("[W]e have typically treated child sex offenses as serious crimes, upholding severe sentences in these cases."); *State v. Berger*, 212 Ariz. 473, 479, ¶ 26, 134 P.3d 382, 384 (2006) (describing charges of sexual exploitation of a minor, based upon mere possession of pornographic images of children, as "very serious felonies"); *State v. Taylor*, 160 Ariz. 415, 422, 773 P.2d 974, 981 (1989) ("Under the *Solem* analysis, child molestation is undeniably a serious offense."); *Gibson v. State*, 721 So.2d 363, 368 (Fla.App.1998) ("Considering the gravity of the offense of capital sexual battery and the harshness of the penalty of life imprisonment without the possibility of parole, we

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punishable, pursuant to Ala. Code 1975 § 13A-5-6(a)(1), by life or a term of not more than 99 years and not less than 10 years); A.C.A. §§ 5-14-101(1)(A), 5-14-103(a)(3)(A) & (c), 5-4-401(a)(1) (deviate sexual activity with child under 14 is punishable in Arkansas by "not less than 10 years and not more than 40 years or life"); F.S.A. §§ 794.011(1)(h) & (2)(a), 775.082, 921.141 (sexual battery of child under 12 is a capital crime punishable by death or mandatory life); Ga. Code Ann. § 16-6-2(a)(2), (b)(2) (life or split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by lifetime probation); K.R.S. §§ 510.070(2), 510.010(1), 532.060(2)(a) (Kentucky punishes deviate sexual intercourse with a child under 12 with imprisonment of not less than 20 years nor more than 50 years); L.S.A.-R.S. § 14:42(A)(4), (D)(2) (Louisiana punishes oral sex with child under 13 by death or life imprisonment without parole); Ind. Code § 35-42-4-3(a) (Class A felony, which is punishable by 20 to 50 years, pursuant to Ind. Code § 35-50-2-4); M.G.L.A. 265 § 23 (rape and abuse of child is punishable in Massachusetts by life or any term of years); Miss. Code Ann. §§ 97-3-95(1)(d), 97-3-97(a), 97-3-101(3) (fellatio with child under 14 punishable by life or imprisonment for not less than 20 years); Utah Code Ann. § 76-5-403.1 (first-degree sodomy on child under 14 is punishable by indeterminate sentence of not less than 6, 10, or 15 years or which may be for life); *Adaway v. State*, 902 So.2d 746, 753 (Fla.2005) (listing Florida, Louisiana, Ohio, and North Carolina as states mandating life imprisonment for the perpetrator's first sexual assault of a child) (Pariente, C.J., concurring); *Jones v. State*, 861 So.2d 1261, 1263 (Fla. App.2003) (observing that Texas has a sentencing range of 5 to 99 years, while Mississippi and Rhode Island have sentencing ranges of 20 years to life); *People v. Huddleston*, 816 N.E.2d 322, 341-42 (Ill.2004) (observing that Louisiana authorizes the death penalty or life imprisonment, and that Florida and North Carolina mandate life imprisonment); *Taylor v. State*, 841 N.E.2d 631, 632-33 (Ind. 2006) (defendant who made victim perform oral sex on him was sentenced to prison for 50 years); *State v. Taylor*, 821 So.2d 633, 642 (La.App.2002) (upholding natural life sentence for sexual battery of child under 12 years of age and observing that death was an available sentence); *State v. Higginbottom*, 324 S.E.2d 834, 836-37 (N.C.1985) (upholding life sentence for defendant who forced victim under 12 years of age to perform fellatio); *State v. Bishop*, 717 P.2d 261, 271 (Utah 1986) (upholding sentence of 5 years to life for defendant who committed fellatio with a 13-year-old boy after observing that the defendant who committed fellatio with an 11-year-old boy and a 13-year-old boy in Utah could have received life sentences for both crimes in Idaho and Texas, and a life sentence for his act with the 11-year-old in Kentucky, North Carolina, and Tennessee).

do not question the legislature's wisdom in deciding that this crime is a very grave offense warranting severe punishment. Child predation is a serious concern."); *State v. Bishop*, 717 P.2d 261, 269-70 (Utah 1986) (observing that "[c]rimes against children are usually looked upon as more heinous than those committed against adults," describing the long-term injuries that flow from the sexual predation on children, and concluding that "[i]t is reasonable, therefore, to view such crimes as particularly serious crimes").

2. When performing the first part of the gross-disproportionality analysis, you may identify the legislative objectives or purposes served by the applicable sentencing range without explicit statements of legislative intent. *See State v. Wagstaff*, 164 Ariz. 485, 490-91, 794 P.2d 118, 123-24 (1990) ("The legislature's purpose in enacting the Dangerous Crimes Against Children Act *can be surmised*. Protecting the children of Arizona and punishing severely those who prey upon them certainly are two legislative goals.") (emphasis added).

The penological goals of deterring socially devastating behavior, imposing retribution for each one of the defendant's criminal acts, and incapacitating dangerous individuals are all valid grounds for justifying a sentencing scheme. *See United States v. Walker*, 473 F.3d 71, 82-83 (3rd Cir. 2007) (upholding 18 U.S.C. § 924(c)'s mandatory consecutive sentencing provision because the Congressional purpose was "to protect society by incapacitating those criminals who demonstrate a willingness to repeatedly engage in possession of firearms and to deter criminals from possessing firearms during the course of certain felonies"); *United States v. Angelos*, 433 U.S. 738, 751 (10th Cir. 2006) ("Notably, both of these penological theories [deterrence and incapacitation] have been held by the Supreme Court to be valid and subject to deference by the courts.") (citing *Ewing v. California*, 538 U.S. 11, 24-28 (2003), and *Harmelin v. Michigan*, 501 U.S. 957, 998–99 (1991)); *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2003) ("Mandating consecutive sentences is not an unreasonable method of attempting to deter a criminal, who has committed several offenses . . . from doing so again.") *People v. Preciado*, 116 Cal.App.3d 409, 412, 172 Cal. Rptr. 107, 108–09 (1981) (upholding the mandatory imposition of consecutive sentences for multiple violent rapes because the defendant's resulting punishment was "directly proportionate to the number and violence of his crimes").

3. To give the court a good frame of reference, you should cite Supreme Court cases and other precedent that demonstrate the constitutionality of stiff sentences imposed for crimes of equal or lesser gravity. *See Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (upholding two statutorily-mandated consecutive prison terms of 25 years to life for two counts of petty theft under California's recidivist statute); *Ewing v. California*, 538 U.S. 11, 30-31 (2003) (upholding mandatory prison term of 25 years to life for California recidivist convicted of felony grand theft); *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring) (upholding mandatory life imprisonment without parole for a first-time offender who stood convicted of simple possession of 672 grams of cocaine); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (upholding two consecutive 20-year prison terms imposed for selling 3 ounces of marijuana and possessing 6 ounces of marijuana for distribution); *Rummel v. Estelle*, 445 U.S. 263, 285 (1980)

(upholding life sentence, with parole eligibility, imposed upon a Texas recidivist whose three theft-related crimes involved money and property having an aggregate worth of $229.11); *O'Neil v. Vermont*, 144 U.S. 323, 331 (1892) (307 consecutive prison terms exceeding 54 years for 307 counts of selling illegal liquor).

4. Because Arizona's child pornography sentencing statutes, especially for mere possession, rank at the top end of the national spectrum, cases with comparable sentences are difficult to find. The following cases might prove helpful. *See United States v. Miknevich*, 638 F.3d 178, 185-86 (3rd Cir. 2011) (upholding 151-month sentence for one count of possession of child pornography); *United States v. Hart*, 635 F.3d 850, 858-59 (6th Cir. 2011) (upholding statutory-minimum 15-year sentence for attempting to produce child pornography during internet conversations with undercover officer posing as a 14-year-old girl); *United States v. Polk*, 546 F.3d 74, 77-78 (1st Cir. 2008) (upholding imposition of 15-year statutory-minimum sentence upon defendant who attempted to produce child pornography by corresponding with an undercover officer posing as a 13-year-old girl); *United States v. Betcher*, 534 F.3d 820, 822, 826-28 (8th Cir. 2008) (upholding consecutive sentences totaling 750 years for taking "numerous pornographic and erotic pictures of his two young granddaughters and their three girlfriends"); *State v. Berger*, 212 Ariz. 473, 480, ¶ 29, 134 P.3d 382, 389 (2006) (upholding mandatory minimum 10-year sentences on each conviction for possession of child pornography without conducting inter- and intra-jurisdictional analysis, even though Arizona's penalty for this crime ranks as the Nation's stiffest sentence); *State v. McPherson*, 228 Ariz. 557, 563-64, ¶¶ 13-16 (App.2012) (upholding seven consecutive 10-year prison terms for DVD containing seven images of child pornography); *Bennett v. State*, 665 S.E.2d 365, 366-68 (Ga.App.2008) (upholding 11 consecutive 20-year prison terms totaling 220 years against child-pornography defendant charged with 24 counts of sexual exploitation of children); *Schultz v. State*, 811 P.2d 1322, 1335-36 (Okla.Crim.App.1991) (two consecutive 20-year terms for child-pornography possession upheld).

5. Because the Eighth Amendment is much more tolerant of imposing severe sentences against recidivists, every effort should be made to highlight the fact that the defendant committed other crimes, even if they did not result in conviction, because of the recognized interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Wigglesworth v. Mauldin*, 195 Ariz. 432, 437, ¶ 17, 990 P.2d 26, 31 (App.1999) (quoting *Rummel v. Estelle*, 445 U.S. 263, 276 (1980)). *See also State v. Berger*, 212 Ariz. 473, 481 n.5, 134 P.3d 378, 386 n.5 (2006) ("For purposes of proportionality review, a prior criminal record may, however, increase the gravity of the offense that underlies a challenged prison sentence. … For example, this court may well have reached a different result in *Davis* if the defendant had prior adult criminal convictions."); *State v. Zimmer*, 178 Ariz. 407, 410, 874 P.2d 964, 967 (App.1993) (although defendant had no prior felony convictions, lengthy consecutive prison terms were not grossly disproportionate because he had sexually abused many children besides the charged victim).

6. **Conversely, the absence of any criminal history does not render the defendant's sentence grossly disproportionate or unconstitutional.** *See Harmelin v. Michigan*, 501 U.S. 957, 994–96, 1001–09 (1991) (upholding life sentence without parole for a defendant who possessed 672 grams of cocaine but had no prior convictions); *United States v. Robinson*, 617 F.3d 984, 990 (8th Cir. 2010) ("Although it is true that Robinson has no significant criminal history, his sentence is based on two separate raids conducted six months apart in which officers found loaded firearms in close proximity to drugs, cash, and drug trafficking paraphernalia."); *United States v. Looney*, 532 F.3d 392, 396–97 (5th Cir. 2008) (defendant's lack of criminal history did not render her life sentence unconstitutional); *United States v. Beverly*, 369 F.3d 516, 536 (6th Cir. 2003) (rejecting Eighth Amendment challenge to consecutive terms totaling 71.5 years, despite defendant's argument that "his sentence is 'grossly disproportionate' to his crime of having driven the getaway car in four bank robberies and provided false identification documents, especially given that he had no prior criminal record and supplied critical information to the FBI about the crimes during its investigation"); *Ramos v. Weber*, 303 F.3d 934, 938 (8th Cir. 2002) (refusing to find defendant's lack of prior convictions grounds for inference because of prior uncharged criminal conduct); *State v. Berger*, 212 Ariz. 473, 481 n.5, 134 P.3d 378, 386 n.5 (2006) ("Berger has no prior criminal record, and *Davis* noted that the defendant there had no prior adult criminal record. … This fact is not in itself a basis for challenging a mandatory prison sentence as grossly disproportionate."); *State v Long*, 207 Ariz. 140, 146, ¶ 30, 83 P.3d 618, 624 (App.2004) (finding no gross-disproportionality inference, despite the fact that defendant had no criminal record, except for a traffic ticket).

7. Keep in mind that crimes committed against persons are more serious than property crimes, and that deliberate and intentional misconduct has greater gravity than negligent or reckless behavior. *See State v. Berger*, 212 Ariz. 472, 480, 482, ¶¶ 34-35, 49, 134 P.3d 382, 390, 392 (2006) (defendant did not "come into possession of these images fleetingly or inadvertently," but used search terms to download child pornography over several years, which demonstrated that he "consciously sought to do exactly that which the legislature sought to deter and punish"); *State v. Jonas*, 164 Ariz. 242, 264, 792 P.2d 691, 711 (1990) ("Additionally, defendant's conduct was an intentional offense against a person, not property, which makes it a more serious crime."); *State v. Stuck*, 154 Ariz. 16, 24, 739 P.2d 1333, 1341 (App.1987) ("The offenses in this case were sufficiently grave to warrant a harsh penalty. The acts were intentional.").

8. In sex-crime cases, courts have justified harsh consecutive sentences based upon the defendant having a parental or quasi-parental relationship with the child. *See State v. Long*, 207 Ariz. 140, 146, ¶ 31, 83 P.3d 618, 624 (App.2004) ("The facts support the inference that he had established a position of trust as a quasi-parental figure."); *State v. Zimmer*, 178 Ariz. 407, 410, 874 P.2d 964, 967 (App.1993) ("This is a case of predatory conduct by a mature adult in a position of trust and authority with a young and unwilling victim."); *State v. Hamilton*, 177 Ariz. 403, 407, 868 P.2d 986, 990 (App.1993) ("Defendant had a far more effective weapon at his disposal: quasi-parental authority."); *State v. Kasten*, 170 Ariz. 224, 229, 823 P.2d 91, 96 (App. 1991) (upholding

sentences imposed upon a defendant who "stood in a parent-child relationship with the victim").

9. In *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003), the narrow age difference between the defendant and the victim and the defendant's relative youthfulness played no small role in the Arizona Supreme Court's finding of an inference of gross disproportionality. Conversely, the defendant's crime is deemed more serious when he is a mature adult and much older than his victims. *Compare Davis*, 206 Ariz. at 380, ¶¶ 7-10, 79 P.3d at 68 (holding that three consecutive 13-year prison terms was unconstitutional as applied to a 20-year-old defendant of below average intelligence convicted of having consensual sex with two 14-year-old girls, where the defendant would not have been criminally liable had his victims been 15 or older and he was within 2 years of their age), *with State v. Berger*, 212 Ariz. 473, 482, ¶ 49, 134 P.3d 382, 391 (2006) (upholding 20 consecutive 10-year sentences imposed upon a mature, married, 52-year-old high school teacher who knowingly sought and possessed numerous images of child pornography over a 6-year period); *State v. Zimmer*, 178 Ariz. 407, 410, 874 P.2d 964, 967 (App.1993) (upholding lengthy sentences for three acts of molestation against an Eighth Amendment attack, where the defendant was "a 53-year-old husband and father" and the victim was only 11-years-old); *State v. Hamilton*, 177 Ariz. 403, 407, 868 P.2d 986, 990 (App.1993) (same result where defendant, who was 30 years old, had molested children who were 14 years old).

10. The subjective aspect of the Arizona Supreme Court's gross-disproportionality inquiry behooves the State to demonstrate that the defendant's misconduct fell within the core, not the periphery, of the prohibitions of the statute he violated. This is a fact-driven exercise that depends on the facts of the case and the crime charged.

A. In child pornography cases, the State needs to make part of the record information like the following: (1) the extent to which the defendant's collection of contraband surpassed the number of charged images; (2) how many "hits" for the most common pedophilic search terms the forensic investigator found on the defendant's computer or storage media; (3) the length of time during which the defendant consumed child pornography; (4) the types of activities depicted in the defendant's child pornography (intercourse, rape, bestiality, etc.); (5) the ages of the children depicted and their sexual partners; (6) whether the defendant attempted to have sex with minors or had a history of sexual conduct with minors; and (7) whether the defendant used child pornography to groom potential victims.

These recommendations are based upon the following passage from *Berger*:

> Berger is in a fundamentally different situation than was the defendant in *Solem*. Berger received a statutorily mandated minimum sentence for each of his separate, serious offenses. The ten-year sentence imposed for each offense is consistent with the State's penological goal of deterring the production and possession of child pornography.

> The evidence showed that Berger knowingly gathered, preserved, and collected multiple images of child pornography. When confronted by the police, he acknowledged that he had "downloaded some things that he was not proud of, and was not sure if he should have downloaded them or not." Additionally, in response to police questions, Berger admitted he had downloaded images of people under eighteen and that he believed these people were involved in sexual conduct. He also possessed a news article describing a recent arrest of another person in Arizona for possession of child pornography.
>
> The images for which Berger was convicted, graphically depicting sordid and perverse sexual conduct with pre-pubescent minors, were well within the statutory definition of contraband. Nor did Berger come into possession of these images fleetingly or inadvertently. Berger had obtained at least two images in 1996, some six years before his arrest. The websites Berger flagged as "favorites" included graphic titles indicating that they provide underage, and illegal, pornographic depictions. His computer contained "cookie" files and text fragments indicating he had searched for or visited websites providing contraband material. Berger also had recordable CDs indicating he had specifically set up a "kiddy porn" directory, which included other subfolders with titles indicating a collection of contraband images.
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> Taken together, this evidence indicates that, in the terminology of Ewing, Berger's sentences are "amply supported" by evidence indicating his "long, serious" pursuit of illegal depictions and are "justified by the State's public-safety interest" in deterring the production and possession of child pornography. Ewing, 538 U.S. at 29–30 [ ].

State v. Berger, 212 Ariz. 473, 480, ¶¶ 33-36, 134 P.3d 378, 385 (2006).

B. In crimes involving actual children, the State should present to the sentencing judge information that illustrates the true extent of the harm occasioned by his misconduct, including: (1) the ages of the defendant and the victim; (2) the types of sexual activity committed; (3) the length of the sexual relationship; (4) whether the defendant had a sexual history with other minors; (5) whether the victim contracted a sexually transmitted disease, became pregnant, abused other children in the same way as the defendant abused him; (6) whether the defendant threatened the victim or loved ones; and (7) whether the defendant had a criminal history of any kind.

C. Prosecutors have opportunities to present this information besides during trial, including: (1) the State's response to defense motions for release; (2) motions in limine to admit evidence of uncharged acts or visual depictions; (3)

settlement conferences; (4) aggravation/mitigation hearings; and (5) sentencing memoranda.

These alternative methods of making a record assume greater importance when the defendant pleads guilty and does not proceed to trial because the defendant may raise Eighth Amendment challenges in Rule 32 and federal habeas petitions.

D. When the defendant's charged acts fall on the periphery of the conduct prohibited by the statute, the State should recognize the potential Eighth Amendment violation that could occur during the charging stage or while negotiating plea agreements. For example, if the defendant's conduct also violates a statute that does not constitute a dangerous crime against children, it would be appropriate to consider either charging him with that non-DCAC offense instead or offering a plea to the non-DCAC offense to avoid the constitutional problem. If it is necessary to charge and try the defendant for a dangerous crime against children because no alternatives exist, the State should marshal all the facts that move the defendant toward the core of the statutorily prohibited conduct—*i.e.*, the graphic nature of the visual depictions, the extent of his collection, the frequency of sexual activity with a post-pubescent child, criminal history for sexual offenses, etc.

E. The State could inadvertently create the false impression that the defendant's criminal conduct falls on the periphery of the statutory prohibition by charging the defendant with only a small number of his illegal acts. If the defendant is charged with possessing just a few images of child pornography, but amassed a huge collection of uncharged visual depictions before the day of his arrest, you should present that information to the sentencing judge to show that the defendant did not "come into possession of these images fleetingly or inadvertently." *State v. Berger*, 212 Ariz. 473, 480, ¶ 35, 134 P.3d 378, 385 (2006). *See also id.* at 483, n.6, 134 P.3d at 388 n.6 ("This case does not require us to confront the question of whether the Eighth Amendment can in some circumstances be violated by consecutive sentences for crimes essentially constituting one occurrence. Thus, for example, we need not today decide whether similar sentences would be appropriate if Berger downloaded the images at one sitting, or possessed a book with twenty illegal photographs inside.") (Hurwitz, J., concurring); *State v. Taylor*, 160 Ariz. 415, 420, 773 P.2d 974, 979 (1989) ("Our conclusion might be different if Taylor had acquired all of the photographs at the same time in one book from someone else."). For instance, the State should offer at sentencing evidence that: (1) forensic examination of the computers in the defendant's possession revealed that the charged images were not the sole contraband images he had consumed and retained; and (2) the defendant attempted to lure or seduce minors by using child pornography. Such additional information would be sufficient to defeat an otherwise colorable Eighth Amendment challenge.